Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	MB Docket No. 02-70
	)	
From	)	
	)	
Comcast Corporation and AT&T Corp.,	)	
Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	

EX PARTE PETITION OF JAMES J. CLANCY
TO DENY APPLICATIONS AND REVOKE LICENSES

1. INTRODUCTORY FACTS

Beginning on February 28, 2002,[1] Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, the "Applicants") filed applications (collectively, "Applications"), pursuant to sections 214 and 310(d) of the Communications Act, as amended, 47 U.S.C. §§ 214 and 310, asking the Federal Communications Commission ("Commission") to approve the transfer of control of licenses and authorizations (collectively, "FCC Licenses") currently held or controlled, directly or indirectly, by them in connection with the proposed merger of AT&T and Comcast and related agreements.[2]

The Commission's "AT&T/Comcast Merger Page"[3] sets forth the following facts relevant to the background of the Applications:

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[1] On February 28, 2002, the Applicants filed a Public Interest Statement and associated applications for consent to the transfer of control of certain licenses and authorizations. On various subsequent dates, up to and including March 26, 2002, the Applicants filed additional, related transfer of control applications, re-filed certain applications, and filed supplemental information or amendments to the applications to make them acceptable for filing.

[2] See Protective Order [Document DA-02-734] adopted in this proceeding [M.B. Docket No. 20-70] on March 28, 2002, released March 29, 2002.

[3] AT&T/Comcast Merger Page, at < http://www.fcc.gov >, visited October 31, 2002.

The proposed transfer of control will result from the spin-off of AT&T Broadband Corp. ("AT&T Broadband"), a holding company for AT&T's broadband division, to AT&T's shareholders, and the subsequent merger of AT&T Broadband and Comcast into wholly-owned subsidiaries of AT&T Comcast. After the merger is consummated, existing AT&T shareholders will hold 53 percent of the economic interest and between 54 and 58 percent of the voting interest of AT&T Comcast; existing Comcast shareholders will hold 41 percent of the economic interest and between 3 and 7 percent of the voting interest of AT&T Comcast; and Brian L. Roberts will directly or indirectly hold 1 percent of the economic interest and 33 percent of the voting interest of AT&T Comcast.

AT&T Broadband is a major provider of cable television service, serving 13.44 million customers through cable systems in which AT&T Broadband holds more than a 50 percent interest. AT&T Broadband also holds a 50 percent or less interest in cable systems serving in the aggregate 16,585,000 additional customers. The latter group includes AT&T Broadband's 25.51 percent limited partnership interest in Time Warner Entertainment, which serves 12.8 million cable subscribers on systems that it owns or manages. AT&T Broadband also provides cable modem services and cable telephony services and holds attributable interests in certain national and regional video programming services.

Comcast also is a major provider of cable television service, serving 8,481,500 million subscribers through cable systems in which it holds an attributable interest. Additionally, it holds a general partnership interest in high-speed Internet access service, electronic commerce, video programming and other services. Comcast offers a number of services that it characterizes as "interactive TV services," provides telephone service to over 40,000 customers, and offers integrated broadband communications services to over 4,000 business and governmental customers. Additionally, Comcast holds attributable interests in several regional and national video programming networks, and owns various sports teams and arenas.

The Applicants assert that the proposed transaction will accelerate the deployment of facilities-based broadband and cable telephony services, as well as digital video services. The Applicants submit that this will occur

> because the greater scale and scope of economies, cost savings, and financial standing of the combined company would better enable it to make new investments in these technologies and services. The Applicants also assert that the combined company would be in a better position to leverage AT&T Broadband's expertise in providing cable telephony on the Comcast cable systems.

2. SUMMARY OF ARGUMENT.

1. Federal law prohibits the use of federal channels of communication to transmit obscene material. AT&T has used its FCC Licenses to distribute obscene material, in violation of specific provisions of federal law and FCC policy (see discussion, set forth below).

2. AT&T's conduct in distributing obscene material, using federal channels of communication, is contrary to the public interest. *See Monroe Communications Corporation v. FCC*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990), and discussion, below.

3. When an FCC Licensee comes before the Commission and requests a transfer of FCC Licenses, as AT&T has done herein, the Application for Transfer puts a number of questions into issue. First and foremost is the question about the prior and current use of said FCC Licenses by the FCC Licensee, and the basic character qualifications of the FCC Licensee. These issues must be determined before any transfer is approved.

4. Because of this Application for Transfer, the Commission has the mandate, under federal law, to determine whether AT&T's programming, complained about and discussed herein (see below), is obscene, and therefore in violation of federal law, FCC policy, and the public interest.

5. The federal law requires that the Commission exercise its concurrent jurisdiction to determine the obscenity question of the specifically named films disseminated by AT&T, using federal obscenity standards (*see Illinois Citizens Committee for Broadcasting v. F.C.C.,* 169 App. D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974). *See, also, Monroe Communications Corporation v. F.C.C.*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990), and whether AT&T lacks the requisite basic character qualifications, such that the Applications must be denied, and AT&T's FCC Licenses be revoked. *See* 47 U.S.C. 312.

6. Petitioner is seeking a determination: (a) that the films disseminated by AT&T during the 23 month period from October 20, 2000, through October 2, 2002, and specifically named in connection with this proceeding, are obscene *per se*; (b) that the within described activity by AT&T violates federal law and FCC policy, is a public nuisance, constitutes an unfair business practice under federal law, and is contrary to the

public interest; (c) that such conduct demonstrates that AT&T lacks the basic character qualifications required of FCC Licensees, and that AT&T is not entitled to a transfer of its FCC Licenses; (d) that said Applications therefore must be denied; and further, (e) that AT&T's FCC Licenses be revoked.

7. Petitioner is providing the following as evidence of his claim that AT&T is using its FCC Licenses in such a way so as to disseminate *per se* obscene material under its Cable TV operations, and that this conduct violates federal law, is in contravention of FCC policy, is contrary to the public interest, and demonstrates that AT&T lacks the basic character qualifications required of an FCC Licensee, and is not entitled to transfer or continue to hold its FCC Licenses:

(1) Petitioner is a resident of California, and an attorney with a long-time practice that has centered around issues involving the First Amendment and obscenity law enforcement. Petitioner is a subscriber to the Cable TV service provided by AT&T, the only Cable TV provider available in Petitioner's area. For the purpose of law enforcement, Petitioners has subscribed to and received transmission of AT&T's "In Demand, Pay Per View, Adults Only" Service on Cable Channel 96 (analogue), and Cable Channels 457 and 459 (digital), respectively, since January 1, 2001 to the present, and has recorded such transmissions on videotapes [hereinafter, "AT&T Transmissions"], copies of which will be filed with the Commission[4] in connection with this Petition. The AT&T Transmissions are obscene *per se* in violation of the United States Supreme Court's rulings in *Miller v.* California, 413 U.S. 15 (1973) and its subsequent progeny[5] [setting forth the Constitutional test for obscenity]; *United States v. 12 200 Ft. Reels of Film*, 413 U.S. 123 (1973) [engrafting the *Miller* test into federal law through specific judicial construction, and Paris *Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) [holding that the fact that material is disseminated only to "consenting adults" has no impact on whether the AT&T Transmissions are obscene *per se*, and provides no defense under federal obscenity law.]

(2) Autoptical proferences will be submitted[6] in the form of three computerized *Time and Motion Studies* (*i.e.*, still photo continuities)[7] and computerized (timed) video

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[4] *See* the list of named features at Exhibit A, attached hereto and incorporated herewith, which represents only a partial listing of the AT&T Transmissions that were surveilled. The sheer volume of obscene features makes their duplication lengthy. In addition, certain "9/11" Emergency Precautions have made their transit to Washington, D.C. more difficult. Therefore, additional exhibits in support of this Petition are being delivered to the Commission by a special separate carrier.

[5] The *Miller* test can apply to actual or simulated sexual acts and lewd genital exhibitions. See, for example, *Miller v.* California, 413 U.S. 15, at 24-25 (1973); Smith *v. United States,* 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987).

[6] Because of the size of these exhibits, and the difficulty of their duplication for purposes of review by the FCC, they are being sent to the Commission under separate cover.

[7] The *Time and Motion Study* of the AT&T transmissions were created by recording each specified feature (on VHS videotape). This videotape was thereafter subjected to the computerized process in which each one of the thousand of "picture frames" used by the film producer was "time stamped" by the computer. The computer then "captured" as a "time stamped" photograph (frame) at four second intervals. These photographs were then arranged and labeled sequentially. This results in a visual analysis that "slows" the

tape picture studies of the three motion picture films ["101 Cheerleaders & 1 Jock," "Hell on Heels," and "More than a Handful 9"] which AT&T has been disseminating repetitiously during the past 23 months. In these three films, there is either no dialogue or, as such, virtually no dialogue. Hardcore sexual conduct, exploited in such a way so as to make an appeal to the prurient interest of a specific targeted audience, dominates these and all the AT&T Transmissions.[8]

The aforesaid *Time and Motion Studies* are representative of AT&T's entire "Pay-Per-View "Adults Only" subscription service disseminated during the period described in this Petition.

(3) Also included are computerized *Time and Motion Studies* of AT&T's Transmissions of "pandering" previews, shown before and after the feature "More Than A Handful 9," together with a *Time and Motion Study* showing the use of "subliminal frames" in the "pandering" "Previews After" AT&T's Pay-Per-View Transmission of the Hot Network Feature, "More Than a Handful 9." In preparing the computerized *Time and Motion Study* of the AT&T transmission of its "pandering" previews, it was noted that the film editor inserted "subliminal frames", 1/30 of a second (not visible to the viewer), depicting females in lewd poses within that part of the ad previews, that read "Tune In". Then, using the "frame-by-frame" and the "advance" or "reverse" mode to locate the time for the 10 single frames (1/30 of a second each), and one set of double frames, which were inserted as indicated in the *Time and Motion Study* exhibit. This *Time and Motion Study* captures each lewd frame, sandwiched between the frames of the "tune in" advertisement, as a "subliminal" message to the audience. Use of subliminal advertising is inconsistent with FCC policy and is contrary to the public interest.[9]

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pictorial projection and "stays" the action to a "still photograph" taken every 4 seconds. The resulting "slow motion" study is presented to the Commission in the format of what the legal professions refers to and recognizes as an "Autoptic Proference."

The legend at the bottom of each page provides an analytical "editorial account" by a reviewer of the videotape who has also heard the audio portion, and results in the creation of a "continuity," or "transcript" device, containing a record of what is said, with such additional editorial comments as may be necessary to explain what is occurring. It is important to note that in the case of the above films identified by name, *there is either no "dialogue", or virtually no "dialogue."* This is a common occurrence in "hard-core pornographic films," where the emphasis is on the crass exploitation of sexual conduct for the purpose of making an appeal to the prurient interest of its target audience. *Cf. Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 67 (1973): "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

[8] Because of the size and construction of these exhibits, they are being sent under separate cover.

[9] In this regard, *see* the report by Timothy Egan in the *New York Times* article, dated October 23, 2000, which states that nearly one in five of AT&T's Broadband customers pays an average of $10.00 a film to see that the distributor calls "real, live all-American sex -- not simulated by actors'". A report entitled "Subliminal Survives" (copyright 1997-1999 ParaScope, Inc.), available at < http://sbe.d.umn.edu/subliminal/ > observes: "With the widespread use of digital television on the close horizon, it won't be long before the technology is in place in most homes to insert subliminal messages more easily and effectively than ever before. Will the tactic be used? Will millions at last be manipulated by subliminals?" This web site also posts the following documents: A January 24, 1973 public notice

(4) With respect to the feature "More Than A Handful 9," the version disseminated by AT&T has a playing time of 72 minutes, and uses a total of 129,600 "picture frames" (30 frames per second (of the camera's operation) x 60 seconds x 72 minutes = 129,600) to finalize the pornographer's production. The "computerized" *Time and Motion Study*, originally recorded on a VHS videotape for law enforcement purposes, reverses that process. Contemporaneously with this filing, Petitioner is submitting two DVD disc copies (parts 1-2) of the "timed" version of the 129,600 frames (captured within the computer) of the feature "More Than A Handful 9." The DVD disc copy contains the film "More Than a Handful 9," together with pandering Previews shown Before and Previews shown After said film, which collectively are representative of AT&T's entire "In Demand, Pay Per View, Adult's Only" programming, and which demonstrate that AT&T's violations of federal law, as complained of herein, are intentional and willful. For purpose of analyzing the nature of AT&T's programming, this exhibit has the capacity of being played at slow motion or in the "frame by frame" advance mode. Virtually every "frame" is a "lewd display of the private parts." Under *United States v. Rosen*, 148 U.S. 605 (1896), it is clear that AT&T knew the "content and the character" of the films it disseminated, and that such films were obscene *per se* under federal law.

The aforesaid DVD disc copies, which are representative of AT&T's entire "On Demand, Pay-for-View, Adults' Only" Cable TV programming disseminated during the period described, are being contemporaneously submitted with this Petition, and are incorporated by reference herein as though set forth in full.

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states the FCC position on the issue: "we believe that use of subliminal perception is inconsistent with the obligations of a [broadcast] licensee, and therefore we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive." *See Public Notice*, Federal Communications Commission, FCC 74-78, 08055, January 24, 1974 - B, "Broadcast of Information by Means of "Subliminal Perception" Techniques. In 1977, twenty years after the first reported use of subliminal ads in movies, the FCC released an 8-page information bulletin on subliminal projection, reviewing the history of controversial subliminal telecasts. *See* Federal Communications Commission, *Information Bulletin*, "subliminal Projection" (1977). Representative Dan Glickman, chairman of the House Subcommittee on Transportation, Aviation and Materials, opened an August 6, 1984 hearing on subliminal communication technology with a reference to "Orwellian developments." Among the guests who contributed testimony was FCC official Dr. John Kamp. His statement updated the subcommittee on the history of government policy toward subliminal communication. *See Statement of Dr. John Kamp, Assistant to the Deputy Chief, Mass Media Bureau, Federal Communications Commission, accompanied by Charles Kelley, Enforcement division, Mass Media Bureau.* This statement references the clear prohibition against use of this technique by holders of Broadcast Licenses (whether the technique is effective or not). The Commission's authority to regulate subliminal projection techniques stems broadly from the public interest provisions of the Communications Act, including, in particular, §§ 303 [giving the Commission general authority to regulate the industry to further the public interest, convenience or necessity] and 317 [contains more specific authority which was reiterated in § 73.1212 of the FCC's regulations, and which essentially prohibit covert advertisements]. He explained that "Subliminal projections, which are designed to sidestep conscious awareness of advertisements, have been found to be against the public interest and the spirit and the language of § 317.

3. AS A REGULAR COURSE OF CONDUCT, AT&T HAS USED ITS FCC LICENSES TO TRANSMIT *PER SE* OBSCENE MATERIAL, IN VIOLATION OF FEDERAL COMMUNICATION POLICY AND FEDERAL LAW. THIS DEMONSTRATES THAT AT&T LACKS THE BASIC CHARACTER QUALIFICATIONS REQUIRED OF FCC LICENSEES, AND IS THEREFORE NOT ENTITLED TO A TRANSFER OF SAID FCC LICENSES. THE APPLICATIONS MUST BE DENIED.

As recognized by the Commission, this License Application proceeding involves broad public policy and legal issues. Under federal law, said Applications cannot be approved where the record reflects that either the transferor or the transferee lack the basic character qualifications required of FCC Licensees. In addition, no application for transfer can be approved where the transfer would be contrary to the public interest.

This Ex Parte Petition[10] addresses these important public policy and legal issues. Under the United States Constitution, Congress has been given plenary power over federal communications, and the creation of federal communication policy. Pursuant to this power, Congress has enacted a number of federal statutes that are designed to punish and deter the use of federal channels of communication to traffic in obscenity. As a matter of federal communication policy and federal statute, AT&T's transmission of obscenity raises a federal question, subject to mandatory review and adjudication by the Commission in this federal forum.[11]

Federal Treaty[12], statutes, and cases *comprehensively* ban[13] the use of federal channels of communication to transmit obscene material for all audiences (*i.e.* it is illegal to use federal channels of communication to disseminate obscene material to both children and adults, including "consenting adults").[14] Obscenity, by definition, is the crass exploitation of human sexuality using explicit depictions or descriptions of hard-

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[10] Submitted pursuant to the procedures set forth in Section 1.1206 of the Commission's rules applicable to non-restricted proceedings.

[11] AT&T's request for transfer of FCC Licenses places the obscenity of their programming in issue, and opens up mandatory federal review of the issues raised in this Petition. The Commission has concurrent jurisdiction to determine the obscenity issue raised by AT&T's conduct. *See Illinois Citizens Committee for Broadcasting v. F.C.C.,* 169 App. D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974). *See*, also, *Monroe Communications Corporation v. F.C.C.*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990).

[12] *See* Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511, Treaties in Force 209 (U.S. Dept. of State), *cited in* Roth v. United States, 354 U.S. 476, 495 n. 15 (1957).

[13] *See, for example,* 18 U.S.C., §§ 1460-1470; *United States v. Alpers,* 338 U.S. 680 (1950); *Roth v. United States*, 354 U.S. 476 (1957), *United States v. Reidel,* 402 U.S. 351 (1971), *United States v. Thirty-Seven* Photographs, 402 U.S. 363 (1971), United *States v. 12-200 Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973), *United States v. Orito,* 413 U.S. 139 (1973), and *Smith v. United States*, 431 U.S. 291 (1977), *Reno v. ACLU*, 521 U.S. 844, n. 44 (1997), *ApolloMedia Corp. v. Reno*, 19 F.Supp.2d 1081, *judgment affirmed*, 119 S.Ct. 1450 (1999) (Mem).

[14] *See Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), and 18 U.S.C. §§ 1460-1470..

core sexual conduct for the purpose of making an appeal to a prurient interest in sex, and has no serious literary, artistic, political, or scientific value.[15] Obscenity is not protected by the First Amendment.[16]

Contrary to federal law and Federal Communication Commission policy, AT&T has used its FCC Licenses in the operation of its cable TV business to disseminate obscene materials as a regular and continuing course of conduct, for the purpose of commercial profit. AT&T's conduct violates specific federal statutes which are part of the Congressional articulation of Federal Communication Policy, which include:

(1) 18 U.S.C. § 1468: This section proscribes the distribution of obscene material by cable or subscription television. As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

(2) 18 U.S.C. § 1466: This section prohibits engaging in the business of selling or transferring obscene matter. "Engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of

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[15] *See Miller v. California*, 413 U.S. 15, at 24-25 (1973); *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987), which set forth the constitutional test for obscenity. The *Miller* test has been judicially engrafted into federal law under *United States v. 12 200 Ft. Reels of Film,* 413 U.S. 123 (1973). Under the so-called "*Miller*" test, three elements must coalesce: the trier of fact must determine whether (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in nudity, sex, or excretion; (2) the average person, applying contemporary community standards, would find that work depicts or describes in a patently offensive way, sexual conduct (*i.e.* ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse), and (3) a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. Federal obscenity enforcement proceedings such as the instant case, issues involve "community standards." Community standards are a "measure" (and not an "element") of the obscenity offense. "The phrasing of the *Miller* test makes clear that contemporary standards take on meaning *only* when they are considered with reference to the underlying questions of fact [*i.e.* involving prurient appeal and sexual conduct] that must be resolved in an obscenity case." *Smith v. United States,* 431 U.S. 291, 300 (1977). *See Smith v. United States, supra,* at 302: "[C]ommunity standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. *See, also, Hamling v. United States,* 418 U.S. 87, 107 (1974): "This court has emphasized on more than one occasion that a principle concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *See, also, Miller v. California,* 413 U.S. at 33; *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966); and *Roth v. United States*, 354 U.S. 476, 488-90 (1957). In making any determination under "contemporary community standards" the trier of fact: "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required [community standards] determination, just as he is entitled to draw on his own knowledge of the propensities of a "reasonable" person in other areas of the law. *Hamling, supra*, 418 U.S. at 104-105. In a civil proceeding involving a determination of obscenity (such as this), no jury is required. *Cf. Alexander v. Virginia*, 413 U.S. 836 (1973). *See, also, Illinois Citizens Committee for Broadcasting v. F.C.C.,* 169 App.D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974) and *Monroe Communications Corporation v. F.C.C.*, 283 U.S. app. D.C. 367, 900 F.2d 351 (1990).

[16] *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States,* 354 U.S. 476 (1957).

earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income.

(3) 18 U.S.C. § 1465: This section prohibits the use of a facility or means of interstate or foreign commerce, in or affecting such commerce, for the purpose of sale or distribution of obscene material.

(4) 18 U.S.C. § 1464: This section proscribes the use of any means of radio communication to transmit obscene matter.

(5) 18 U.S.C. § 1462: This section proscribes the bringing of obscene material into the United States, or any place subject to the jurisdiction thereof, or the use of an express company or common carrier for carriage of obscene materials in interstate or foreign commerce.

(6) 18 U.S.C. § 1961: This section makes the violation of 18 U.S.C. §§ 1461-1465 (relating to obscene matter) a predicate offense under the Racketing and Corrupt Practices Act (RICO).

(7) 18 U.S.C. § 1467(b): This section indicates that AT&T, as a result of its corporate choice to transmit obscene material using channels of federal communication under its control, may have seriously harmed the corporation and its shareholders, and deliberately misrepresented and falsely characterized its actions before the United States Security and Exchange Commission.[17] § 1467(b) specifically states that with respect to (1) any obscene material produced, transported, mailed, shipped, or received in violation of 18 U.S.C. Chapter 71 [Obscenity; 18 U.S.C. §§ 1460-1470]; and (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense, all right, title, and interest vests in the United States *upon the commission of the act giving rise to forfeiture under this section* [*i.e.* upon AT&T's dissemination of the obscene material]. In addition, any property, real or personal, used or intended to be used

[17] The provisions of 18 U.S.C. § 1467(b) clearly indicate that any AT&T profits received from the dissemination of obscene materials would be subject to forfeiture. *See SEC No Action Letter pursuant to Rule 14a-8*, dated February 21, 2001, Re AT&T Corp., 2001 SEC No-Act. LEXIS 240, involving a proposal by a group of AT&T Shareholders requesting that AT&T prepare a report reviewing AT&T's policies for involvement in the pornography industry and an assessment of the potential financial, legal, and public relations liabilities. In that SEC proceeding, by letter dated December 21, 2000, AT&T opposed this request, and affirmatively (and, it would appear, erroneously) stated: "The Company's actual policy regarding cable programming is a responsible and ethical one." *Id.* Subsequent correspondence in connection with this SEC matter indicated that Shareholders had received reports that AT&T was retaining 90% of the distribution revenue from its "On Demand, Pay-for-View, Adult's Only" cable service. *See* Letter to Joseph P. Gallagher, Manager, Office of the Corporate Security, AT&T, dated April 23, 2001, from Frank A. Rauscher, President & CEO, Aquinas Investment Advisers, Inc. Objectively speaking, the retention by a cable company of 90% of the distribution revenue from programming provided by a movie studio would "raise a red flag" to any reasonable investor concerning the legitimacy of the distribution agreement. This is because the "rate of return" (90%) for distribution of films suffers from being "too good to be true." This would, of necessity, raise suspicions in the minds of any reasonable Investment Advisor, because of the highly unusual payment structure, indicating that the product being disseminated under the AT&T agreement is categorically dissimilar from other "product" obtained from the more "conventional" Major Movie Studio sources. AT&T shareholders were reasonable in their fears that producers of hard-core obscene films might be willing to pay a heavy financial price to "buy respectability." In addition, Shareholders expressed the concern that some of these suppliers were reputed to have ties to organized crime, according to reports received by Shareholders, and therefore might involve AT&T in collusion with organized crime.

to commit or to promote the commission of such offense may also be subject to forfeiture, if subsequently so determined by a court, taking into consideration the nature, scope, and proportionality of the use of the property in the offense.

(8) 18 U.S.C. § 1470: In the event that the facts surrounding certain reports[18] establish that these transmissions include minors under the age of 16 years, AT&T may be found to be in violation of 18 U.S.C. § 1470, which prohibits the use of any facility or means of interstate or foreign commerce to knowingly transfer obscene matter to minors.

(9) 19 U.S.C. § 1305: This section prohibits the importation of obscene materials, and provides for its forfeiture. *See United States v. 37 Photographs*, 402 U.S. 363, at 376-377 (1971).

(10) 47 U.S.C. §§ 308 (Requirements for License), 309 (applications for License), and 310 (License Ownership Restrictions): These sections requires that in FCC Licensing proceedings, the Commission is charged with considering basic character qualifications of FCC Licensees, and must act to promote the public interest.

(10) 47 U.S.C. § 312: This section provides for administrative sanctions. The Commission may revoke an FCC License or construction permit for a violation of the obscenity statute.

(11) 47 U.S.C. § 503: The Commission may exact a forfeiture or other sanction upon a licensee that has violated the obscenity statute.

(12) 15 U.S.C. § 45: This basic consumer protection statute declares as unlawful any "unfair methods of competition" and "unfair or deceptive acts or practices," in or affecting commerce.

4. AT&T's DISSEMINATION OF *PER SE* OBSCENE MATERIAL IS CONTRARY TO THE PUBLIC INTEREST. THE APPLICATIONS MUST BE DENIED.

As more fully discussed below, the conduct of AT&T in the operation of cable TV has been so notorious[19], that based upon this conduct alone, federal law and FCC policy require that the Commission deny the Applicants' current requests for transfer. The public interest, convenience and necessity mandate denial.

For the reasons set forth in this Ex Parte Petition, the Applications should be denied, because

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[18] *See SEC No Action Letter pursuant to Rule 14a-8*, dated February 21, 2001, Re AT&T Corp., 2001 SEC No-Act. LEXIS 240, involving a proposal by a group of AT&T Shareholders requesting that AT&T prepare a report reviewing AT&T's policies for involvement in the pornography industry and an assessment of the potential financial, legal, and public relations liabilities. By letter dated February 16, 2001, Shareholders expressed concern, with respect to the ability of children to access AT&T's pornographic programs on the Hot Network, that the so-called safeguards which the Hot Network claimed to have in place were clearly far from foolproof, noting that in the year 2000 the "safeguards" failed utterly in Iowa City where the Hot Network was temporarily made available for everyone to view who was a cable subscriber.

[19] As hereinafter described, AT&T's conduct violates FCC Policy and federal and state law.

(1) AT&T has demonstrated that it lacks the basic character qualifications required of an FCC Licensee, based upon its past conduct. The corporate decision of AT&T to engage in certain past conduct is now a matter of public record, and has serious implications with respect to its ability to transfer any FCC licenses it may hold, which cannot be "cured." The filing of the Applications affirmatively opens up a review of the "basic character qualifications" of AT&T. This Commission must review and make a determination on this issue. If the past conduct of AT&T demonstrates it lacks the requisite basic character qualifications, the Applications must be denied.

(2) The granting of the Applications is contrary to the public interest.

(3) With respect to the public interest, the granting of the Applications would create harm.

(4) With respect to the public interest, the granting of the applications would make worse an already harmful situation.

(5) AT&T's wrongful business decisions have negative consequences, and affect in particular the manner in which their Applications must be analyzed. Denial of the Applications has both specific and general deterrence value with respect to the cable industry and violations of FCC policy and federal law. Granting the Application is contrary to the public interest, because it would insulate corporate business from the consequences of wrongful decisions and would reward corporate greed. Denial of the Applications will help restore public confidence in the integrity of Government, by encouraging and promoting the value of corporate integrity.

The Commission must designate the above-captioned proceeding for hearing upon at least the following issues:

(1) To determine whether AT&T and/or its subsidiaries, employees or agents exhibited *per se* obscene programming, in violation of federal or state law.

(2) To determine whether AT&T and/or its subsidiaries, employees or agents engaged in unfair trade practices by exhibiting *per se* obscene programming, in violation of federal or state law.

(3) In light of the facts and circumstances adduced pursuant to issues (1) and (2) above, whether AT&T and/or its subsidiaries possess the requisite character qualifications to be permitted to transfer control of their cable television system and related licenses and radio stations; and

(4) In light of the facts and circumstances adduced pursuant to issues (1), (2), and (3) above, whether the public interest, convenience and necessity would be served by a grant of the Applications.

CONCLUSION OF LAW

Where, as here, reasonable minds would not differ and all reasonable persons would say that AT&T, has been *and is now dealing exclusively in matters which are per se obscene*, their FCC Licenses to do so cannot be transferred, but must be revoked. This is because *such business practices are unlawful as a matter of law* and *not* as a question of fact. The moral and legal obligation of the Commission, *as a governmental body implementing the policy of the Bush Presidency, requires* that AT&T's FCC Licenses be revoked.

WHEREFORE, James J. Clancy urges that the Applications BE DENIED, DISMISSED OR DESIGNATED FOR HEARING upon the issues framed above and/or other appropriate hearing issues, and that AT&T BE DIRECTED TO SHOW CAUSE why their FCC Licenses should not be REVOKED, at a hearing to be held at a time and location to be specified upon the issues framed above and/or other appropriate hearing issues.

Dated: November 3, 2002

Respectfully submitted,

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